



John Elias Baldacci  
Governor

## Maine Department of Health and Human Services

Office of Administrative Hearings  
Marquardt Building  
11 State House Station  
Augusta, ME 04333-0011

Brenda M. Harvey  
Commissioner

James D. Bivins  
Director

TO: Brenda M. Harvey, Commissioner  
Department of Health and Human Services  
221 State Street  
11 State House Station  
Augusta, ME 04333

**DATE MAILED:** Nov. 03, 2006

In Re: Penobscot Nursing Home—Appeal of Disallowance of \$9.25 of direct care reimbursement  
in the audit of fiscal year ending December 31, 2004

### RECOMMENDED DECISION

An administrative hearing was held on August 22, 2006, at Ellsworth, Maine in the case of Penobscot Nursing Home before Hearing Officer Michael L. LeBlanc. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services. The record was left opened until September 12, 2006, to receive closing arguments from the parties.

### ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated April 11, 2006, this matter was assigned by James D. Bivins, Esq., Chief Administrative Hearing Officer to the undersigned Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

*Was the Department correct when it disallowed \$9.25 of direct care reimbursement during the MaineCare Nursing Facility audit for Penobscot Nursing Home for fiscal year ending December 31, 2004?* (Exhibit HO-5)

### APPEARING ON BEHALF OF APPELLANT:

Rosemarie Giosia, Esq.  
Wendell Dennison, Administrator, Penobscot Nursing Home

### APPEARING ON BEHALF OF AGENCY:

Jane Gregory, AAG  
Herbert F. Downs, Director, Office of Audit

*Our vision is Maine people living safe, healthy and productive lives.*

## **ITEMS INTRODUCED INTO EVIDENCE:**

### Hearing Officer Exhibits:

- HO-1. Rescheduling notice dated 5/31/06
- HO-2. Rescheduling notice dated 4/26/06
- HO-3. Entry of appearance dated 4/26/06
- HO-4. Notice of hearing dated 4/12/06
- HO-5. Order of Reference dated 4/11/06
- HO-6. Hearing Report dated 4/4/06
- HO-7. Request for hearing dated 2/22/06, with attachments
- HO-8. Appellant's closing arguments dated 9/11/06
- HO-9. Department's closing arguments dated 9/12/06

### Department Exhibits:

- D-1. MaineCare Benefits Manual, Chapter III, Section 67 (effective 1/1/04)
- D-2. MaineCare Benefits Manual, Chapter III, Section 67 (effective 9/1/04)
- D-3. Cost Report for fiscal year ending 12/31/04
- D-4. Audit Report Transmittal dated 12/5/05
- D-5. Request for informal review dated 12/29/05
- D-6. Revised Audit Report Transmittal dated 1/23/06
- D-7. Final Informal Review Decision dated 1/25/06
- D-8. Request for hearing dated 2/22/06, without attachments
- D-9. Spreadsheet: comparison of base year rates, cost of hours for direct care
- D-10. Spreadsheet: cost of rebasing
- D-11. Spreadsheet: minimum staffing calculation based on 5/10/15
- D-12. Computation of Interim Prospective Rate

## **RECOMMENDED FINDINGS OF FACT:**

### **A. FACTUAL BACKGROUND**

1. Penobscot Nursing Home ("Penobscot") is a nursing facility located in Penobscot, ME. It is licensed for sixty (60) beds. Penobscot is a MaineCare Provider. Its fiscal year is from January 1<sup>st</sup> through December 31<sup>st</sup>.
2. The Department of Health and Human Services (the "Department") reimburses nursing facilities that provide services to MaineCare recipients for three (3) cost components: direct care costs, routine costs, and fixed costs.
3. The Department pays each provider nursing facility a prospective interim rate throughout its fiscal year. The prospective interim rate is determined for each quarter of the fiscal year by the Department's Office of MaineCare Services, and the nursing facility is notified quarterly.
4. The nursing facility is required to file a Cost Report with the Department's Office of Audit within five (5) months of the close of its fiscal year. The Office of Audit reviews the cost report, makes revisions where appropriate, and issues an Audit Report settling any differences between the perspective interim rate paid to the nursing facility for that fiscal year and the actual payment due to the nursing facility in accordance with MaineCare

Benefits Manual (10-144 Chapter 301), Chapter III, Section 67, Principles of Reimbursement for Nursing Facilities.

5. On or about May 27, 2005, Penobscot completed its Cost Report for its fiscal year ending December 31, 2004 (“FY 2004”). The Department’s Office of Audit received it on June 1, 2005. (Exhibit D-3)
6. On or about December 5, 2005, the Department’s Office of Audit issued an Audit Report for Penobscot’s FY 2004. (Exhibit D-4)
7. On or about December 29, 2005, Penobscot requested a timely Informal Review of the FY 2004 Audit Report in accordance with MaineCare Benefits Manual, Chapter I, Section 1.21.<sup>1</sup> Penobscot raised the issues of \$9.25 per day in direct care costs disallowed by the Department, and the total MaineCare days allowed by the Department, arguing it was two hundred and seventy (270) days short. (Exhibit D-5)
8. On or about January 25, 2006, the Department issued a Final Informal Review Decision that found an increase of sixty (60) MaineCare days due Penobscot, but denied Penobscot’s claim regarding the disallowance of \$9.25 per day in direct care costs. (Exhibit D-7) On or about January 23, 2006, the Department issued a revised FY 2004 Audit Report including the additional sixty (60) MaineCare days. (Exhibit D-6)
9. On or about February 22, 2006, Penobscot made a timely request for an administrative hearing, appealing only the Department’s disallowance of \$9.25 per day in direct care costs. (Exhibits HO-7 & D-8)

## **B. FACTS REGARDING DISPUTED ISSUE OF DIRECT CARE COSTS**

1. The basis for reimbursement within the direct care cost component is a resident classification system that groups residents into classes according to their assessed conditions and the resources required to care for them. (MaineCare Benefits Manual, Chapter III, Section 67, Principle 41)
2. Direct care costs include salary, wages, and benefits for:
  - a. registered nurses salaries/wages, excluding Director of Nursing;
  - b. licensed practical nurses salaries/wages;
  - c. nurses aides salaries/wages;
  - d. patient activities personnel salaries/wages;
  - e. ward clerks’ salaries/wages;
  - f. contractual labor costs;
  - g. fringe benefits for positions described in a through e, including payroll taxes, qualified retirement plan contributions, group health, dental, and life insurance, and cafeteria plans; and medical supplies, medicine, and drugs that are supplied as part of the regular rate of reimbursement (described in MaineCare Benefits Manual, Section 60), excluding costs that are an integral part of another cost center. (MaineCare Benefits Manual, Chapter III, Section 67, Principle 41.1)

---

<sup>1</sup> Providers are first required to request an informal review and obtain an informal review decision prior to requesting an administrative hearing. Only the issues raised in the request for informal review are preserved for the administrative hearing. See, MaineCare Benefits Manual, Chapter I, Section 1.21-1.A.

3. Penobscot's base year direct care cost component is from its FY 1998, audited cost report. This figure is adjusted by a quarterly inflation factor and Penobscot's quarterly case mix index in determining each quarter's prospective interim direct care cost.<sup>2</sup> Penobscot's base year direct cost was adjusted in accordance with Public Law 99, Chapter 731, to account for an adjustment in minimum staffing ratios of direct care staff to residents to: one (1) direct care staff to five (5) residents on day shift; one (1) direct care staff to ten (10) residents on the evening shift; and one (1) direct care staff person to fifteen (15) residents on the night shift. (MaineCare Benefits Manual, Chapter III, Section 67, Principle 80.3.4.4)
4. The Department's Office of MaineCare Services determines quarterly each nursing facility's, including Penobscot's, prospective interim direct care costs. Each nursing facility, including Penobscot, has the right to appeal the Office of MaineCare Services' determination of its prospective interim direct care cost by filing a request for an informal review before the Director of the Office of MaineCare Services or his/her designee. The nursing facility may request an administrative hearing if dissatisfied with the Office of MaineCare Services' informal review decision. (MaineCare Benefits Manual, Chapter III, Section 67, Principle 41.23.6)
5. For its FY 2004, Penobscot's average prospective direct cost rate per day was \$63.65. Apparently, Penobscot did not appeal any of the quarterly notifications from the Office of MaineCare Services of its prospective interim direct care costs.<sup>3</sup>
6. For its FY 2004, Penobscot's actual average direct cost per day was \$72.90.

#### **RECOMMENDED DECISION:**

The Department **was correct** when it disallowed \$9.25 of direct care reimbursement during the MaineCare Nursing Facility audit for Penobscot Nursing Home for fiscal year ending December 31, 2004.

#### **REASON FOR RECOMMENDATION:**

Policy is clear that a nursing facility will receive MaineCare reimbursement for their perspective rate for direct care costs, or their actual direct care costs, whichever is less.

For dates of service beginning on or after July 1, 2000 facilities that incur allowable direct care costs during their fiscal year which are less than their prospective rate for direct care will receive their actual cost.

Facilities, which incur allowable direct care costs during their fiscal year in excess of their prospective rate for direct care, will receive no more than the amount allowed by the prospective rate. (MaineCare Benefits Manual, Chapter III, Section 67, Principle 80.3.5)

Penobscot argues:

*The nursing home's argument is that the State has the power to bypass the "black and white" approach to the reimbursement rules to be sure that the residents receive the necessary care and the home receives reimbursement for the cost of*

---

<sup>2</sup> The case mix index is a system that takes into account the fact that some nursing facility residents are more costly to care for than others. See, MaineCare Benefits Manual, Chapter III, Section 67, Principle 80.3.1.1, et seq.

<sup>3</sup> No suggestion was made that Penobscot appealed any of the notices of quarterly interim direct care rates issued by the Department's Office of MaineCare Services.

*this necessary care when the calculation established by the rules do not provide for this reimbursement. Conversely, if the rules do not so provide as they are designed to, they need to be revised as they are not doing what they were meant to accomplish.* (Exhibit HO-8)

Essentially, Penobscot argues that the Commissioner should either ignore the rule or change the rule such that Penobscot receives its actual direct care cost for FY 2004. Penobscot argues this should be done because it provided direct care staff in accordance with licensing ratios without exceeding those ratios, but it still incurred actual direct care costs in excess of what the rules allow for reimbursement.

The rule regarding direct care reimbursement by MaineCare is clear, or as Penobscot suggests, black and white. Reimbursement for direct care costs is either the prospective rate or the facility's actual costs, whichever is less. There is no ambiguity or "grayness" to this rule. There is no authority that allows the rule to be ignored. Therefore, it must be followed, as the Department has done.

If the rule should be changed, it is not something that can be accomplished through this appeal. The promulgation of the Department's rules, including changes, must be done according to the Administrative Procedures Act, which requires legislative approval of the rule.

For the reasons above, it is recommended that the Commissioner affirm the Department's decision to disallow \$9.25 of direct care reimbursement during the MaineCare Nursing Facility audit for Penobscot Nursing Home for fiscal year ending December 31, 2004.

**THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN TWENTY (20) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION. A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.**

**DATED: October 31, 2006**

**SIGNED:** \_\_\_\_\_

Michael L. LeBlanc  
Administrative Hearing Officer  
Office of Administrative Hearings

cc: Rosemarie Giosia, Esq., 49 Church Street, Ellsworth, ME 04605  
Penobscot Nursing Home, Wendell Dennison, Administrator, P O Box 15, Penobscot, ME 04476  
Jane Gregory, AAG, Office of the Attorney General  
Herbert F. Downs, Director, Office of Audit